

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

TROY JOSEPH,)	
)	2:15cv1602
Petitioner)	Electronic Filing
)	
vs.)	Judge David Stewart Cercone /
)	Chief Magistrate Judge Maureen Kelly
MARK GARMAN;)	
ATTORNEY GENERAL OF THE STATE)	
OF PENNSYLVANIA,)	
)	
Respondents)	

ORDER ADOPTING REPORT AND RECOMMENDATION

This case was brought under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a person in state custody. The case was referred to Chief Magistrate Judge Maureen P. Kelly for pretrial proceedings in accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1), and Local Civil Rules 72.C and D.

Chief Magistrate Judge Kelly's Report and Recommendation, ECF No. 2, filed on March 2, 2016, recommended that the Petition, ECF No. 1, be denied because it was either second or successive within the meaning of AEDPA or, in the alternative, it amounted to an abuse of the writ. Petitioner was informed that, in accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1)(B) and (C), and the local rules, he had a specific period of time in which to file objections. Petitioner's Objections were filed on March 21, 2016. ECF No. 3.

Nothing in those Objections merits rejection of the Report or extended comment. Petitioner claims that he was somehow misled by Chief Magistrate Judge's Order in the first habeas proceedings, that he include all claims that Petitioner wished the court to consider. ECF No. 3 at 2. But then, somewhat contradictorily, Petitioner claims that he was under the

misconception that he could file the current action in addition to his prior writ of habeas corpus.
Id. at 3.

We note that, as observed by the Report, at the time that Petitioner filed the instant Petition, he had a request for Certificate of Appealability pending in the Court of Appeals for the Third Circuit from Petitioner's first habeas petition. We further note that as of April 14, 2016, the United States Court of Appeals for the Third Circuit denied Petitioner's request for a Certificate of Appealability. Joseph v. Superintendent, No. 15-3872 (3d Cir.).

Irrespective of Petitioner's asserted confusion, the present Petition is either second or successive or, it constitutes an abuse of the writ and the Report was clearly correct. Nothing in the Objections can change this simple reality.

Hence, Petitioner's Objections are OVERRULED.

Accordingly, after *de novo* review of the pleadings and the documents in the case, together with the Report and Recommendation, the following order is entered:

AND NOW, this 3 day of May 2016,

IT IS HEREBY ORDERED that the Petition is DISMISSED.

IT IS FURTHER ORDERED that the Report and Recommendation, ECF No. 2, filed on March 21, 2016, by Chief Magistrate Judge Kelly, is adopted as the opinion of the Court as supplemented by this Order. A certificate of appealability is DENIED as jurists of reason would not disagree with the analysis of the Report even if the procedural question of whether a second petition filed in the District Court can be "second or successive" within the meaning of AEDPA based upon the fact that there is a currently pending request in the Court of Appeals concerning a

first petition, is debatable. The alternative ground that this Petition constitutes an abuse of the writ is not debatable.

The Clerk is to mark the case CLOSED.

DS Cercone

David Stewart Cercone
United States District Judge

cc: The Honorable Maureen P. Kelly
Chief United States Magistrate Judge

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(Via First Class Mail)